2002

Domestic Partnership: Missing the Target?

Margaret F. Brinig
Notre Dame Law School, mbrinig@nd.edu

Domestic Partnership: Missing the Target?

Margaret F. Brinig[*]

When I think of all the worries people seem to find
And how they're in a hurry to complicate their mind
By chasing after money and dreams that can't come true
I'm glad that we are different, we've better things to do
May others plan their future, I'm busy lovin' you. . . .

The Grass Roots, *Let's Live For Today*, *on* Let's Live for Today (MCA Records 1967)

Chapter 6, Domestic Partnerships, like many other parts[1] of the ALI *Principles of the Law of Family Dissolution*, functions as a set of default rules.[2] Under the ALI *Principles* for domestic partnerships, therefore, if the parties meet state presumptive requirements for domestic partnerships and have not otherwise contracted, the rules of Chapter 6 apply.[3] Usually, law sets default provisions to

---

[*] Thanks to all the participants in the BYU symposium for their help, and especially to Steven Nock and Mark Strasser.

[1] Many sections of the PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS [hereinafter ALI PRINCIPLES] have language that allows waiver by agreement between the parties (under Chapter 7). Chapter 2 on Child Custody, for example, specifically notes that its "replication" principle applies only when the parties are not otherwise able to reach agreement. Section § 2.09 (1) begins "Unless otherwise resolved by agreement of the parents under § 2.07 . . ." (Tentative Draft No. 3, Part I, 1998).

[2] Default rules are common in contractual settings. In law and economics jargon, they at least theoretically provide for what most parties would have agreed to under the given circumstances. *See, e.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990); J.P. Kostritsky, *"Why Infer"? What the New Institutional Economics Has to Say About Law-Supplied Default Rules*, 73 TUL. L. REV. 497 (1998); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998); Morten Hviid, *Default Rules and Equilibrium Selection of Contract Terms*, 16 INT'L REV. L. & ECON. 233 (1996). Even more relevant to this paper, fiduciary duties can be seen as default rules. *See, e.g.*, Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209 (1995) (corporations); Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999) (discussing elected officials and election law); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1250–51 (1998) (marriage).

[3] Requiring parties to contract around default rules is strong medicine indeed, if the default principles trigger effects that occur at times when people are not already contracting. If the default rules are applied to commercial contracts (*see, e.g.*, Uniform Commercial Code (U.C.C.) § 1-102 (3) ("The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act . . . ."), and they reflect what most people would rationally choose otherwise, I have no problem. *Accord*, Steven L. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 S. CAL. INTERDISC. L.J. 115 (1993).

1) what most parties would want;[4] or2) to what will promote efficiency.[5] I will dis-cuss these two concepts in turn, illustrating how the ALI domestic partnerships provisions satisfy neither ex ante hypothetical bargaining nor efficiency criteria, and thus that Chapter 6, which purports to set default rules,[6] breaks from this usual pattern. In fact, instead of doing what most parties would want or what is good for broader society, Chapter 6 both over- and undershoots its target.

Apparently (according to the Comments for Chapter 6), the ALI wanted to protect same-sex couples[7] and some who would otherwise fall between the cracks—putative spouses,[8] victims of fraud and deceit,[9] and those who are not legally married but should be estopped from claiming otherwise.[10] Others in this conference[11] are discussing Chapter 6 as it applies to same-sex partners, so I will concentrate here on heterosexual couples.

For heterosexual couples, who will be the vast majority of those affected,[12] being treated between themselves as though they were married, which is what the *Principles* do, probably *isn't* what they want. Most heterosexual cohabiting

---

[4] *See* sources cited *supra* note 2.

[5] Promotion of efficient outcomes, as opposed to what the parties most often want, is the other justification commonly given for default rules. *See, e.g.*, Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389 (1993) (discussing various kinds of efficiency-producing norms); *cf.* Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1820 (1998) ("Commercial law instead provides parties with default rules that, at least in theory, direct the ex ante efficient result in standard cases.").

[6] Comment to § 6.02, of the ALI PRINCIPLES (Tentative Draft No. 4 (2000)), at 13:

> The Chapter does not impose all the consequences of recognition as domestic partners on every couple that falls within its definition, because couples may, by agreement, avoid the rules that this Chapter would otherwise apply . . . . Some may thus understand this Chapter as a set of default rules that apply to domestic partners who do not provide explicitly for a different set of rules. One can see the default rules as, in effect, a contract imposed by law on parties who do not set forth their agreement to some different set of rules.

[7] Section 6.01(1) provides in part that "Domestic partners are two persons of the same or opposite sex, not married to one another . . . ."

[8] *See* Comments to § 6.01(d), at 7, discussing the difference between the traditional putative spouse doctrine and the ALI PRINCIPLES. *See also* Reporter's Notes to Comment d. *Id.* at 9.

[9] *See, e.g.*, Alexander v. Kuykendall, 63 S.E.2d 746 (1951) (damages in fraud and deceit granted to "wife" whose "husband" secretly remained married to another).

[10] *See, e.g.*, Poor v. Poor,409 N.E.2d 758 (Mass. 1980) ("husband" who knew of conditions of wife's extraterritorial divorce equitably estopped from claiming that his subsequent marriage to her was invalid); Psaurodis v. Psaurodis, 261 N.E.2d 108 (N.Y. 1970) (where "husband" did not disclaim marriage in separate maintenance proceeding, he was collaterally estopped from doing so at divorce).

[11] *See, e.g.*, Mark Strasser, *A Small Step Forward: The ALI's Domestic Partners Provision*; Terry Kogan, *Chapter 6, Domestic Partners—Favorable Perspectives and Criticism*; and David Orgon Coolidge, *Global Domestic Partnership Issues*. For an economic analysis, see Robert Rowthorn, *Marriage as a Signal*, section 4, in MARRIAGE AND DIVORCE: AN ECONOMIC PERSPECTIVE (Robert Rowthorn & Antony Dnes, eds., forthcoming, 2001).

[12] Estimates of the number of same-sex couples vary, but the low and high estimates seem to be between two and ten percent of the population. The CURRENT POPULATION SURVEY of March, 1998, Table 8, at 71 (1998), *available at* http://www.census.gov/population/www/-socdemo/ms-la.html, shows 1,674,000 same-sex cohabiting couples compared to 4,236,000 heterosexual unmarried couples and 54,317,000 married couples (Table C, at v).

couples fall into one of two groups. They may be on their way to marriage,[13] in which case the abolition of heartbalm actions[14] by legislatures and at common law suggests a public policy to treat them differently from married persons.[15]

Another set of couples affirmatively wishes to reject marriage,[16] as Chapter 6 recognizes.[17] The Comments to the *Principles* note that Chapter 6 "diminishes the effectiveness of [the] strategy"[18] of avoiding responsibility. To the extent that the goal of Chapters 3 and 4 (Compensatory Payments and Property Division) is

---

[13] *See, e.g.*, Larry L. Bumpass & James A. Sweet, *National Estimates of Cohabitation*, 26 DEMOGRAPHY 615 (1989) ("There is no single answer to whether cohabitation is a late stage of courtship or an early stage of marriage. It is the former for couples who are uncertain about their relationship but are considering marriage, the latter for those who would marry immediately were it not for some practical constraint, and neither for couples who do not want to marry each other.")

[14] For a review, see Margaret F. Brinig, *Rings and Promises*, 6 J. L. ECON. & ORG. 203 (1990). Heartbalm actions, typically involving engaged couples, were breach of marriage promise and seduction. For a recent case discussion, see Miller v. Ratner, 688 A.2d 976 (Md. Ct. App. 1997).

[15] See also the considerations and cases cited in Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996) (stating that contracts for household services are not enforced when couples are married). Contracts in which sexual services predominate are not enforced because akin to prosecution. *See, e.g.*, Hewitt v. Hewitt, 394 N.E.2d 1204, 1208 (Ill. 1979) (citing 6A CORBIN ON CONTRACTS § 1476 (1962) and RESTATEMENT OF CONTRACTS, §§ 589, 597 (1932)).

[16] Thus in a forthcoming review of MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY (2000), Nicholas Bala, Faculty of Law, Queen's University, Kingston, Ontario, argues:

> The motivations for living together outside of marriage are complex, but these relationships frequently arise because one party (often the man) is unwilling to make the commitment of marriage and does not want to undertake the legal obligations of marriage. If the period of cohabitation is short, it may be quite fair to have no obligations arise from the relationship. However, if the relationship is longer term, the expectations of the parties may change over time, even if they do not marry. One partner, most commonly the woman, may "invest" more in the relationship and any children.

Nicholas Bala, 2 isuma(2) 1 (Summer 2001).

[17] Comment to ALI PRINCIPLES § 6.02, at 14 seems to recognize this possibility by noting: "On the contrary, to the extent that some individuals avoid marriage in order to avoid responsibilities to a partner . . ."

[18] *Id.* Provisions even broader than the ALI PRINCIPLES have been legislated in Canada for both same-sex and heterosexual couples. The Canadian Supreme Court in M. v. H., 2 S.C.R. 3 (1999), held that benefits granted to heterosexual cohabitants under the definition of "spouse" under the Family Law Act § 29, granting benefits to separating cohabitants who have lived together at least three years or who have a common child and have lived together in a relationship of some permanence, must be extended to same-sex couples as a matter of equality. In the legislation passed last August, C-23, the definition of "common law partner" for purpose of numerous federal benefits and obligations includes those in a conjugal relationship for one year or more. The CANADIAN CRIMINAL CODE § 215(1)(b) punishes those who do not furnish necessaries to the common law partner. P.S.C., Ch. 46, § 215(1)(b) (2000) (Can.). The application of the benefits and obligations of domestic partnership law to ongoing relationships is a major difference from Chapter 6 of the ALI PRINCIPLES, which does not impose a support obligation while the relationship continues. This is also a difference between Chapter 6 and Vermont's Civil Union status. *See* Coolidge, *supra* note 11, Bala, *supra* note 16, and implicitly the ALI, *supra* note 17 (implying that by imposing duties on separating cohabiting couples, men will not be discouraged from marrying). But they may miss the powerful evidence that men benefit powerfully from marriage, not cohabitation. *See generally* STEVEN L. NOCK, MARRIAGE IN MEN'S LIVES (1999). LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2000).

to encourage specialization between spouses and investment in the family,[19] applying the same principles to dissolving domestic partnerships flies in the face of reality because "cohabiting couples are less specialized than married couples, are less interdependent, and have far more embedded equality goals."[20] They are in the "Live for Today" world of the song with which we began. They thus fail to satisfy the efficiency, or normative, criteria. To understand why, consider what efficiency means in the context of families, as opposed to commercial settings.

For families, I would argue that the usual economic limitations of efficiency are too narrow. In my view, couple relationships seem most "efficient" when they produce intimacy,[21] and parenting relationships are most "efficient" when they allow children to flourish.[22] How does a family develop this efficiency? To get to the "efficient" or in my view "covenantal" relationship, you first need permanence[23] or at least a very long time horizon. In game theory terms, this would be translated to an indefinite termination repeated game.[24] Why does this come first? Because without some idea that the relationship will last forever, or at least for a very long time, you will not get the second necessary ingredient, unconditional love.[25] When you think the relationship will end, both you and your partner have incentives to maximize short-run gain,[26] or at least play "tit for tat."[27]

---

[19] The proper goals for alimony are discussed in a large number of articles. Perhaps the best known is by the Reporter for the ALI PRINCIPLES. Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989). *See also,* June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV.953 (1991); June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV.1463 (1990); Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2451-2453 (1994). The economic justifications for alimony can be found in the somewhat technical Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL STUD.35 (1978).

[20] For a thorough empirical discussion of these points, see Steven L. Nock, *A Comparison of Marriages and Cohabitating Relationships*, 16 J. FAM. ISSUES 53 (1995).

[21] *Accord*, MILTON C. REGAN, FAMILY LAW AND THE PURSUIT OF INTIMACY (1993).

[22] *See* MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 18 (2000). *See also* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2416, 2476 (1995).

[23] *See* BRINIG, *supra* note 22, at 6–7.

[24] *See, e.g.*, ROBERT AXELROD, THE EVOLUTION OF COOPERATION 8–9 (1984); THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 5 (1960); Alvin E. Roth & Francoise Schoumaker, *Expectations and Reputations in Bargaining: An Experimental Study*, 73 AM. ECON. REV. 362, 371 (June 1983).

[25] For lengthier musings about unconditional love, *see* BRINIG, *supra* note 22, at 11, 14, 83–84.

[26] In game theory terms, this is called the Prisoner's Dilemma. These games are described in Jack Hirshleifer, PRICE THEORY AND APPLICATIONS 518–19 (2d ed. 1988). The idea is that two prisoners accused of a common crime are separated and then questioned. Each is told that if he confesses, he will get a reduced punishment. If neither confesses, both will go free because there will not be enough evidence. The theory is that they will both confess if they cannot communicate, because for each that is the lowest risk strategy. For applications to family law, *see, e.g.*, Antony W. Dnes, *Applications of Economic Analysis to Marital Law: Concerning A Proposal to Reform the Discretionary Approach to the Division of Marital Assets in England And Wales*, 19 INT'L REV. L. & ECON. 533 (1999); Scott & Scott, *supra* note 2, at 1278 n.113, 1294; Milton C. Regan, *Market Discourse and Moral Neutrality*, 1994 UTAH L. REV. 605, 646. For children, *see* Paula England & Nancy Folbre, *Who Should Pay for the Kids?* 563 ANNALS AM. ACAD. POL. & SOC. SCI. 194 (1999).

[27] This term comes from AXELROD, *supra* note 24.

In other words, you are in the world of contract, the "exchange relationship."[28] For reasons I hope to demonstrate shortly, the exchange relationship is distinctly not the world of families that law ought to be interested in protecting.

On the other hand, assume now that we have the first two ingredients: permanence, which encourages the second, unconditional love. At this point, we have what "looks like" a family: people who are committed to each other over the very long time horizon and who are giving to each other without an expectation of immediate return or perhaps any return.[29] In Steven Nock's terminology,[30] they are living in the past and future, in a world of debts and futures, rather than the present.[31] At this point, society (the community, meaning the religious community, the state, and even extended families) will act to support the family.[32] There will be laws promoting families,[33] giving constitutional rights,[34] and protecting the entity from outside assault.[35] There will be benefits that flow from being in such a family,[36] and obligations that "are the threads from which intimacy is woven."[37] The members of the family live in covenant.

Policy makers are unlikely to want to provide default rules for cohabitation that would encourage cohabitation,[38] since empirical studies show it is far less stable than marriage.[39] (See Tables 1 and 2). Further, the partners invest less in

---

[28] For a fuller explanation, see Gary L. Hansen, *Moral Reasoning and the Marital Exchange Relationship*, 131 J. SOC. PSYCH. 71 (1991).

[29] As Steven Nock puts it, "cohabiting couples are less specialized than married couples, are less interdependent, and have far more embedded equality goals," Nock, *supra* note 20, at X.

[30] Steven L. Nock, *Turn-Taking as Rational Behavior*, 27 SOC. SCI. RES. 235, 243 (1999).

[31] *Id.* at 239–41 (1998) (Certain behavior in marriage only makes sense if its turn-taking nature is considered; marriages exist not only in the present, but more vividly in their "histories and futures").

[32] *See* Margaret F. Brinig, *Troxel and the Limits of Community*, *available at* http://www.uiowa.edu/~mfblaw.

[33] For a description of those available to married couples, *see* Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27 (1996).

[34] One of the latest pronouncements of a parental right to autonomy came in *Troxel v. Granville*, 120 S. Ct. 2054 (2000).

[35] For example, consider the household exemption from bankruptcy and the "family estate" or tenancy by the entirety that shields marital property from creditors.

[36] For a "nonexclusive" list of such benefits, see the Vermont Civil Union Legislation, 2000 Vermont Laws P.A. 91 (H. 847), Section 1204(e) (listing twenty-four such benefits).

[37] Nock, *supra* note 30.

[38] The Comments to ALI PRINCIPLES § 6.02, at 14 (2000), note that "[i]t is not an objective (or a likely effect) of this Chapter to encourage parties to enter a nonmarital relationship as an alternative to marriage." A good and contemporary survey of the signaling effects of marriage versus cohabitation (including results of numerous international studies) appears in Rowthorn, *supra* note 11. Encouragement could also come from the "channeling function" law provides. Thus the distinction between cohabitation, which society disfavors, could channel couples into marriage, the more favored institution. *See, e.g.*, Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 520–21 (1992) (discussing *Marvin v. Marvin*).

[39] Larry L. Bumpass, et al., *The Role of Cohabitation in Declining Rates of Marriage*, 53 J. MARRIAGE & FAM. 913 (1991). *See also* Bumpass & Sweet, *supra* note 13, at 620–21 (stating that "most cohabiting couples either marry or stop living together within a few years; two fifths . . . do not continue as cohabi[tants] for more than one year, only one-third last 2 years, and only 1 in 10 are still cohabiting after 5 years," with the median duration of 1.3 years.) *See generally* PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES:

each other or in the relationship[40] than they do if married.[41] In other words, cohabitation does not promote "economic efficiency" in the same way marriage does.[42] For example, when men marry, they do much better financially than if single or cohabiting,[43] presumably either because their wives "nag" them into more responsible behavior,[44] or because women contribute "backup" support that makes men's labor force participation more focused.[45] Cohabitants are more likely than married couples to share household tasks relatively equally and to generally value gender equality.[46]

The following provides some evidence of how equal sharing does not necessarily promote stability in marriage. This study[47] includes married couples in their first marriages[48] who are reporting on whether or not they see the sharing

---

MONEY, WORK, SEX 594 Table 3 (showing cohabitating relationships lasting a median of 1.7 years) (1983). Even a casual look at marriage statistics shows they are far more stable. First, more than 50% of all marriages, even those contracted after 1980, endure until one of the parties dies. Second, even for the minority that end in divorce, the average length of marriage is about seven years. *See, e.g.*, Douglas W. Allen & Margaret Brinig, *Sex, Property Rights, and Divorce*, 5 EUR. J. L. & ECON. 211 (1998).

[40] The mechanism for making these investments through marriage and enforcing them at divorce is discussed in Carbone & Brinig, *supra* note 19, at 959.

[41] Nock, *supra* note 20, at X.

[42] *See, e.g.*, Schwartz, supra note 5, at 1820 (Default Rule); *cf.* Schwartz, supra note 5 (Contract Theory Approach).

[43] *See, e.g.*, VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 58–60 (1988) (comparing economic situation of married women and men with that of unmarried women and men). *See also* NOCK, *supra* note 18, at 66, 143 (showing the National Longitudinal Survey of Youth: 1979-93, and showing that the same married men earn $4,260.85 more than before they were married, holding age constant).

[44] The virtues of nagging are discussed in WAITE & GALLAGHER, *supra* note 18, at 55–57; *see also* Linda J. Waite, *Does Marriage Matter?*, 32 DEMOGRAPHY 483, 496 (1995) (noting that such assistance and advice results in "'freeing husbands' for work.").

[45] For an argument that these contributions justify a share in earning capacity upon divorce, *see* Margaret F. Brinig, *Property Distribution Physics: The Talisman of Time and Middle Class Law*, 31 FAM. L.Q. 93 (1997). *See also* ARLIE HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (1989); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991); and JOAN WILLIAMS, UNBENDING GENDER (2000) (describing an "ideal worker" who has the support of a homemaker spouse).

[46] NOCK, *supra* note 18, at 16.

[47] Margaret F. Brinig & Steven L. Nock, *Divorce and the Division of Labor, in* MARRIAGE AND DIVORCE: A LAW AND ECONOMICS APPROACH (Dnes and Rowthorn, eds., *available at* http://www.uiowa.-edu/~mfblaw/).

[48] The National Survey of Families and Households (NSFH) was first administered in 1987–88 and included personal interviews with 13,007 respondents from a national sample. The sample includes a main cross-section of 9,637 households plus an oversampling of blacks, Puerto Ricans, Mexican Americans, single-parent families, families with step-children, cohabiting couples and recently married persons. One adult per household was randomly selected as the primary respondent. Several portions of the main interview were self-administered to facilitate the collection of sensitive information and to ease the flow of the interview. The average interview lasted one hour and forty minutes. In addition, a shorter self-administered questionnaire was given to the spouse or cohabiting partner of the primary respondent. Brinig and Nock use identical questions asked of the primary respondent and his or her spouse. The NSFH was administered by the Center for Demography and Ecology of the University of Wisconsin-Madison. Brinig and Nock held constant almost all known predictors of divorce (age at first marriage, education, income, race, etc.). They found that the divorce and separation rate at the time and for the state where the respondent was living at the age of 16, are all significant predictors of divorce. An increase in divorce and separation percents increase the odds of divorce, while an increase in the percent who never married lowers the odds of divorce.

of household and labor force tasks as fair.[49] The coefficients in Table 3 hold constant other factors that might influence marital stability (numbers of children, whether their parents divorced, whether they cohabited, income, education and so forth). At any combination of values for paid work (e.g., the first block of nine cells) agreement by both partners that the arrangement is unfair to the *other person* produces the best outcomes (i.e., lowest risk of disruption). For example, when both partners feel that paid work is unfair to themselves (the first nine-cell block in the table), the risks of disruption range from 4.43 to .72. The higher risk obtains when partners each feel household tasks are unfair to themselves. The lower value obtains when both feel such tasks are unfair to their partner.

The point is that for these couples, reporting in the late 1980s and staying together or divorcing in the early 1990s, it was not even division, but either a lack of concern of what each put in on household tasks or an acknowledgement that the wife was doing too much that made the marriages more stable. Those who in 1987–88 looked short term and expected equal treatment were more likely to experience marital failure by 1992–93. In addition to our study, there is considerable literature supporting this point.[50]

Cohabiting partners thus have less commitment to each other than do married spouses,[51] and are more likely to think in terms of short-term rather than long-term consequences. In fact, cohabitation is usually an exchange relationship, which produces less satisfaction[52] than one taking an "internal stance"[53] central to a meaningful interpersonal relationship. In marriage, a relationship centered upon short-run gains signals instability.[54]

Even the landmark cohabitation opinion, *Marvin v. Marvin*,[55] noted that "[l]est we be misunderstood, however, we take this occasion to point out that the structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution."[56] As a community, we in effect don't give the relationship trust,[57] so why treat it as though we do? Brinig and Nock, in their recent work, have found that where young people grow up in areas where there is a higher percentage of

---

[49] Brinig & Nock, *supra* note 47.

[50] For an analysis of what wives and husbands perceive as "fair," see Herbert L. Smith et al., *Identifying Underlying Dimensions in Spouses' Evaluations of Fairness in the Division of Household Labor*, 27 SOC. SCI. RES. 305 (1998).

[51] Nock, *supra* note 18, at 53.

[52] Hansen, *supra* note 28.

[53] MILTON C. REGAN, ALONE TOGETHER: LOVE AND THE MEANING OF MARRIAGE 24 (1999).

[54] For an empirical investigation of this point, *see* Brinig & Nock, *supra* note 47; Nock, *supra* note 18.

[55] 557 P.2d 106 (Cal. 1976).

[56] *Id.* at 122.

[57] Margaret F. Brinig & Steven L. Nock, "I Only Want Trust," paper presented at the American Association of Law Schools Annual Meeting, San Francisco, January, 2001, *available at* http://www.uiowa.edu/~mfblaw (describing trust from the community as central to good relationships).

divorced people, the males delay first marriages.[58] In other words, one of the effects of a relatively high divorce rate seems to be a higher rate of cohabitation. We know from other work that, surprisingly, marriages entered into after cohabitation are less, not more stable, than those of couples who do not cohabit first.[59]

As an interesting corollary, consider the fact that African-American women are currently less likely to marry,[60] and more likely to cohabit and to divorce,[61] than white women. These minority women, regardless of strength of religious preference, are the ones most likely to opt into covenant marriage in Louisiana.[62]

---

[58] *Id.*, Table 4. For an indication that this greater selectivity in marriage may be the reason for the decline in the divorce rate since 1991, see Stéphane Méchoulan, Department of Economics, Northwestern University, 2000, "Divorce Laws and the Structure of the American Family," paper presented at the American Law and Economics Association Annual Meeting, May 7, 2000.

[59] William G. Axinn & Arland Thornton, *The Transformation in the Meaning of Marriage*, *in* THE TIES THAT BIND 147, 161 (Linda J. Waite, ed., 2000) (citing Bumpass & Sweet, *supra* note 13). There is no necessary contradiction between a lower divorce rate (because of current cohabitation) and the higher tendency of first marriages to dissolve where there has been prior cohabitation because of the delay between marriage and divorce. Using life history data from the British Household Panel Study, John Ermisch and Marco Francesconi estimate that about three in five cohabitations turn into marriage and 35 percent dissolve within ten years. *Cohabitation in Great Britain: Not for Long, But Here to Stay*, JOURNAL OF THE ROYAL STATISTICAL SOCIETY, Series A, vol. 163, Part 2, 153–172 (2000). For Britain, Kathleen Kiernam has estimated that 8 percent of couples who get married before their first child is born split up within five years of the child's birth. The figure is 25 percent for cohabiting couples who marry after their baby is born, Kathleen Kiernan, *Childbearing Outside Marriage in Western Europe*, 98 POPULATION TRENDS 11, 19 & Table 11 (Winter 1999), and 52 percent for those cohabiting couples who never marry. Without children, if couples cohabit instead of "marrying directly," they are 10.5 times more likely to experience dissolution. Kathleen Kiernan, *Cohabitation in Western Europe*, 96 POPULATION TRENDS 25, 30 & Table 7 (Summer 1999). Only slightly more than 20 percent of cohabiting partnerships survive ten years. Note that because of the difference in time periods measured, the childless and childbearing couples cannot be compared directly.

Generally speaking, the presence of a child increases union stability. *See, e.g.* Brinig & Nock, *supra* note 47 at 12 & Table 4 (more than 50% lower risk of disruption). *See also* Larry Bumpass, Teresa Castro and James Sweet, *Background and Early Marital Factors in Marital Disruption*, MADISON CENTER FOR DEMOGRAPHY AND ECOLOGY, 1990; Paul C. Glick and Arthur Norton, *Marrying, Divorcing, and Living Together in the U.S. Today*, 32 POPULATION BULL. 1 (1977); Aphra R. Katzev, Rebecca L. Warner and Alan C. Acock, *Girls or Boys? Relationship of Child Gender to Marital Instability*, 56 J. MARR. & FAMILY 89 (1994); Lee H. Lillard & Linda J. Waite, *A Joint Model of Marital Childbearing and Marital Dissolution*, 30 DEMOGRAPHY 653 (1993); Linda J. Waite and Lee A. Lillard, *Children and Marital Disruption*, 96 AM. J. SOC. 930 (1991). For discussions of statistics in Scandinavian countries, see Ann-Zofie E. Duvander, *The Transition From Cohabitation to Marriage: A Longitudinal Study of the Propensity to Marry in Sweden in the Early 1990s*, 20 J. FAM. ISSUES 698 (1999); Ann Klimas Blanc, *The Formation and Dissolution of Second Unions: Marriage and Cohabitation in Sweden and Norway*, 49 J. MARR. & FAM. 391 (1987). The breakup rate for Swedish cohabitants with a child, according to Kiernan, RelationshipXX (Table 11) is four times higher than for married Swedes. For an international survey, see PATRICIA MORGAN, *Marriage-Lite: The Rise of Cohabitation and its Consequences*, LONDON INSTITUTE FOR THE STUDY OF CIVIL SOCIETY (2000).

[60] *See, e.g.*, R. Kelly Raley, *Recent Trends and Differentials in Marriage and Cohabitation: The United States*, THE TIES THAT BIND 19, 24 (Linda J. Waite ed., 2000).

[61] M. Belinda Tucker, *Marital Values and Expectations in Context: Results from a 21-City Survey*, *in* THE TIES THAT BIND 166, 182-83 (Linda J. Waite, ed., 2000).

[62] *See* report of Steven L. Nock, *in* CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS, AND PERSPECTIVES 125 (2d ed., 2000). Covenant marriage is authorized by LA. CIV. CODE Art. 9, §§ 102 et seq. (1997) and ARIZ. REV. STAT. §§ 25-901 et seq. (1998). These regimes are described in Margaret Brinig & Steven Nock, *Covenant and Contract*, 12 REGENT U. L. REV. 9, 10–11

One might well hypothesize that because African-Americans value marriage as much as do others,[63] those who seek covenant marriage are looking for a lasting relationship and think that more stringent divorce rules (or more required counseling) will enhance their chances.

In sum, by using a default rule that is *not* what people would most likely agree to in advance, we force those who do not want this type of relationship into contract-mode, which is hard on the relationship (forcing over-planning)[64] and destroys "covenantal" thinking as the parties focus on what they can get out of the venture[65] and how long it will last.[66] As those of us who read family law cases know, couples in committed relationships are unlikely to choose contracting.[67]

Default rules usually work best when parties are in the middle of making contracts anyway,[68] but the *Principles*' rules ripen only at some specified time

---

(1999).

[63] Tucker, *supra* note 61, at 175. *See generally* Wendy D. Manning & Pamela J. Smock, *Why Marry? Race Relations and Transition to Marriage Among Cohabitors*, 32 DEMOGRAPHY 509 (1995); Michael J. Brien & Lee A. Lillard, *Interrelated Family-Building Behaviors: Cohabitation, Marriage, and NonMarital Conception*, 36 DEMOGRAPHY 535 (1999).

[64] For an example of over-planning, see the Peter and Susan contract from Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 1169, 1281 (1974), reproduced in SCHNEIDER & BRINIG, *supra* note 62, at 377. For a discussion of related dysfunctions of contract as used in family law, *see id.* at 459–60, 464, 467–68.

[65] People in covenant relationships love unconditionally—that is, they have no expectation of an immediate, tit-for-tat reward, and may never expect a financial award. For examples of my writing on unconditional love, *see* BRINIG, *supra* note 16, at 83–84; and Brinig & Nock, *supra* note 62, at 15–19 (unconditional love in the Biblical and family contexts). The Biblical parallel is to God's generosity even when what we are given, or what we accomplish in return, may not be equal. *See, e.g.*, *Matt.* 20: 1–16 (laborers in the vineyard all were paid the daily wage, even though they began at different times); *see also* Janet Moore, *Covenant and Feminist Reconstructions of Subjectivity Within Theories of Justice*, 55 LAW & CONTEMP. PROBS. 159, 172 (Summer 1992) (citing Jon D. Levenson, *Covenant and Commandment*, 21 TRADITION 42, 50 (1983) (discussing the Hebrew view of covenant between God and Israel, as expressed in the book of Joshua)).

As we report elsewhere, some couples who were asked to estimate how many hours they and their spouse spent on a variety of household tasks during the last week did not answer the questions. These marriages were more stable than those who did answer them, holding all else constant, and more stable than those who reported that the division of household and labor force tasks were "about equal." Brinig & Nock, *supra* note 57, text at n.52.

[66] People who contract covenant relationships do so with the idea that they are permanent. They are designed to last for the joint lifetimes of the parties, and to be intergenerational. For examples of my writing on permanence, *see* BRINIG, *supra* note 16, at 194–96 (permanence in marriage); Brinig & Nock, *supra* note 62, at 19–21 (permanence in the Biblical and family covenants); and Margaret F. Brinig, *The Family Franchise: Elderly Parents and Adult Siblings*, 1996 UTAH L. REV. 393 (discussing how the concept of permanence works in a society that allows divorce and emancipates children).

[67] Some data from surveys of same-sex couples (who have very high incentives to contract) reveals that as of 1995, 10 percent or less had written agreements. *The Advocate* Survey (1994-95). Data for married couples is nearly impossible to obtain, since it will not be filed anywhere unless the marriage dissolves. By definition, then, we cannot know how often American couples write antenuptial contracts. An article written in 1988 suggests that there are "more" such agreements than previously. Sheryl Nance, *'Til Some Breach Doth Them Part*, NAT'L. J., Nov. 7, 1988 at 1.

[68] Most of the default provisions of the ALI PRINCIPLES, such as the custody principle discussed in footnote 1, take conscious effect when the parents are bargaining at the time of divorce. However, the ALI domestic partnership rules can take effect when the parties probably are not even thinking of contract—they

after the couple's relationship begins. While arguably couples at the time they marry aren't thinking in contract-mode,[69] it is even less likely that they will be doing so some years down the line when the state-defined "cohabitation period"[70] or "cohabitation parenting period"[71] completes, and their relationship ripens from mere cohabitation into "domestic partnership."[72]

At the same time the *Principles* may do more for couples who are not interested in being protected or protect some that might better be left on their own, the *Principles* "undershoot" by doing too little for couples who may need more support.[73] By giving less protection to the relationship in terms of third

---

ripen or vest after some period of time when the cohabitors are in the midst of their relationship. Even where the regime is quite harsh and its effects are well known, cohabiting parties frequently do not bargain at the time they enter relationships. For examples, see the statistics on same-sex relationships cited *supra* note 42, and those on contracting around civil law community property regimes in Quebec before 1970, found in INTERNATIONAL ENCYCLOPEDIA OF LAWS, Family Law, Canada § 373, at 136–137 (1998) (even though prenuptial agreements are more common in Quebec than elsewhere in Canada, they are only executed by the wealthy as of 1989, because statutes now disallow contracting out of the "family patrimony," which is divided equally, and separate property (formerly the regime of choice) is now the default. *Id.* at §§ 284-285, at 112–13).

[69] Nor do they understand the legal regimes of marriage and divorce, nor the likelihood that their own marriage will falter. Lynn A. Baker & Robert Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 L. & HUM. BEH. 439 (1993).

[70] ALI PRINCIPLES § 6.03(3) provides that persons are "presumed to be domestic partners when they have maintained a common household . . . for a continuous period that equals or exceeds a duration, called the *cohabitation period*, set in a uniform rule of statewide application" (emphasis in original).

[71] ALI PRINCIPLES § 6.03(2) provides that "[p]ersons are domestic partners when they have maintained a common household . . . with their common child . . . for a continuous period that equals or exceeds a duration, called the *cohabitation parenting period*, set in a uniform rule of statewide application" (emphasis in original).

[72] Similar problems of proof plague persons attempting to establish common law marriage, since the requisite agreement to be married "in words of the present tense" must have existed before the parties cohabit and "hold themselves out" as married to the community. *See, e.g.*, Marriage of Winegard, 278 N.W.2d 505, 510 (Iowa 1979). Many times couples will move in together gradually, and will not form an intent either to set up a domestic partnership or to be married at common law until a later time. Such problems of intent are considered in Shrader v. Shrader, 484 P.2d 1007 (Kan. 1971) (describing woman who did not want to "absolutely remarry" after couple got divorce of first marriage); Conklin v. Conklin, 557 N.W.2d 102 (Iowa Ct. App. 1996) (ruling no common law marriage, although parties had been married at one time and cohabited together for several years before the man's death, where they did not consistently claim to be married); and Goldin v. Goldin, 426 A.2d 410 (Md. App. 1981) (finding Catholic religious beliefs impeded second ceremonial or common law marriage although the couple cohabited in Pennsylvania on weekends). Iowa may have solved some of them by providing for recording of common law marriages. Iowa Code Ann. § 595.11 provides:

> Marriages solemnized, with the consent of parties, in any manner other than that prescribed in this chapter, are valid; but the parties, and all persons aiding or abetting them, shall pay to the treasurer of state for deposit in the general fund of the state the sum of fifty dollars each; but this shall not apply to the person conducting the marriage ceremony, if within fifteen days after the ceremony is conducted, the person makes the required return to the county registrar.

[73] The support and recognition of the community are vital for maintaining vibrant marriages. *See* Margaret F. Brinig, *Community Involvement and Its Limits in Marriages and Families*, *in* MARRIAGE IN THE TWENTY-FIRST CENTURY (Alan J. Hawkins & Lynn D. Wardle, eds., Greenwood Press, forthcoming 2001). Community support not only strengthens families, it also helps the individual. For empirical results, see Brinig & Nock, *I Only Want Trust*, *supra* note 57, at table 2 (divorced, noncustodial fathers are more depressed than divorced fathers or divorced men in general, even holding constant income and prior depression). For a theoretical discussion, see REGAN, *supra* note 21, at 77–102.

party recognition,[74] the couple is *less* free to promote intimacy[75] than is the married couple, whether married ceremonially or by common law.[76] There is no requirement that *during* the relationship partners support one another or provide

[74] This would include income and gift-tax relief, the marital communications privilege, interspousal tort immunity, the "necessaries" or "family expense" doctrine, intestate succession, tenancy by the entireties and other "family homestead" protections. For a description of these communications practices, *see* REGAN, *supra* note 53, at 89–139 (marital testimonial communications), 31 (interspousal immunity), 202–03 (necessaries).

[75] As I explained in Margaret F. Brinig, *Status, Contract and Covenant*, 794 CORNELL L. REV. 1573 (1994), and as Milton Regan points out in REGAN, *supra* note 21, at 77, 83, 96, status offers an opportunity for happiness because it restrains the "free play of subjectivity." The definition of roles that status provides therefore does not fetter, but rather frees us. *See* Brinig, *supra*, at 1587. I cited to St. Paul's passage in Galatians 5:1, that by being in bondage to Christ, the Christian finds the greatest liberty "Stand Fast therefore in the liberty wherewith Christ has made us free, and be not entangled with the Yoke of bondage." *Id.* n.82.

[76] This point is also made by Nock, *supra* note 18. Nock finds that the felt obligation to or imagined commitment of the spouse is the strongest influence on individual commitment to marriage. *Id.* at 513. Economists refer to financial, time and labor commitments of this sort to the marriage enterprise as "marriage-specific capital." BECKER, *supra* note 5, at 325–30. On the other side of the story, Nock explains that "were an individual to perceive absolutely no costs to terminating a relationship, we could describe that person as having virtually no commitment to it." Nock, *supra* note 19, at 505. Thus, cohabiting partners demonstrate less commitment and their relationships become less stable. Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53 (1995).

medical care.[77] They do not enjoy the privileges of confidential communications[78] or tort immunities.[79] They cannot hold property as a community[80] or by the

---

[77] This objection seems to be met, at least at a minimal level, by California's domestic partnership provisions, which apply to same-sex couples and to persons over 62 CAL. FAM. CODE § 297 (2000), allows registration of domestic partnerships in which partners must agree to assume joint responsibility for each other's "basic living expenses," authorizes state and local employers to offer health care coverage and other benefits to domestic partners of employees, and requires health-care facilities to permit visits by a patient's domestic partner. *See also* MODERNIZATION OF BENEFITS AND OBLIGATIONS ACT, R.S.C., Ch.C-23 (2000) (Can.) (amending CRIMINAL CODE § 215(1)(b) to punish those who fail to provide necessaries to a common law partner). Denmark (through the DANISH REGISTERED PARTNERSHIP ACT, 1989), Norway (in the Norwegian Registered Partnership Act of 1991), Sweden (1995), and Iceland (1996), all have registered same-sex partnerships, which recognize almost all of the consequences of marriage. *See generally* Sanford N. Katz, *Emerging Models for Alternatives to Marriage*, 33 FAM. L.Q. 663 (1999). In *People v. Delph*, 156 CAL. RPTR. 422 (Cal. Ct. App. 1979). The marital communication privilege was held to be inapplicable to nonmarried cohabitants. The privilege fosters the marital relationship by encouraging spouses to share their intimate thoughts and secrets, thus adding intimacy and support to the marriage. *See generally* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 94, 447–51 (2000); *see also* Steven N. Gofman, Note, *"Honey, The Judge Says We're History": Abrogating the Marital Privileges Via Modern Doctrines of Marital Worthiness*, 77 CORNELL L. REV. 843, 848 n.26 (1992) (stating that "marital privileges evolved because courts and legislatures, by implication, determined that protecting the harmony of legal marital unions was more important than truth-seeking at trial") (footnote omitted). Note, Kristina K. Pappa, *Privileged Communcations*, 25 SETON HALL L. REV. 1591 & n.12 (1995). Following *Marvin*, 557 P.2d 106, unmarried cohabitants have brought claims in wrongful death, inheritance rights, the marital communication privilege, the effect of cohabitation on the termination of spousal support, and other areas. *See* Comment, *The Property Rights of Unmarried Cohabitants—A Proposal*, 14 CAL. W. L. REV. 485, 498–99 (1979).

THE ALI PRINCIPLES apply to family dissolution, not ongoing relationships. State laws presumably govern ongoing relationships. State laws limit requirements of support to married couples or parents of minor children. For example, 750 ILL. COMP. STAT. 15/1 provides in § 1 that:

> Every person who shall, without any lawful excuse, neglect or refuse to provide for the support or maintenance of his or her spouse, said spouse being in need of such support or maintenance, or any person who shall, without lawful excuse, desert or neglect or refuse to provide for the support or maintenance of his or her child or children under the age of 18 years, in need of such support or maintenance, shall be deemed guilty of a Class A misdemeanor and shall be liable under the provisions of the Illinois Public Aid Code.

[78] For a lengthy discussion of these principles see REGAN, *supra* note 53. *See also* Milton C. Regan, *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045 (1995) (setting forth distinctions between the confidential communication privilege and the adverse testimony privilege, and giving many citations).

[79] The immunity does work, if allowed by statute, during voidable marriages. *See* Gordon v. Pollard, 336 S.W.2d 25 (Tenn. 1960) (abrogating the immunity in Tennessee because marriage had been previously annulled with decree stating it was "void ab initio" (Tennessee later abrogated the immunity).

[80] *See* Western State Constr. Co., Inc. v. Michoff, 840 P.2d 1220, 1225 (Nev. 1992) (Springer, KJ., dissenting); *cf.* Lindemann v. Lindemann, 960 P.2d 966 (Wash. 1998) (holding that parties who cohabit knowing they are not married may hold property as though it were community property, even though in the absence of marriage there is by definition no community property. The opinion states "[u]pon dissolution of a marriage, all separate and community property is before the court for distribution. A different rule applies upon the break-up of a quasi-marital relationship. To avoid equating cohabitation with marriage, the Supreme Court held in *Connell* that a court may distribute only the property that the cohabiting couple has acquired through efforts extended during the relationship.") (footnote omitted); Carroll v. Lee, 712 P.2d 923, 929 (Ariz. 1986) ("This Court recognizes that community property rights derive solely from the marital relationship . . . and the law will not give non-marital cohabiting parties the benefit of community property"). *See generally* Katz, *supra* note 77, at 666–67 (citing Sanford N. Katz, *Marriage as Partnership*, 73 NOTRE DAME L. REV. 1251, 1263–68 (1998)).

entireties.[81] If one of them dies, the other does not have the benefit of intestacy[82] laws, as would a putative spouse.[83] Supporting children does not become a common enterprise because of the adults' relationship.[84] In short, the *Principles* apply only in cases of dissolution.[85] Heterosexual couples who want or intend to be married, and their children, are better protected by marriage, common law marriage,[86] the putative spouse doctrine, and other common law remedies.

---

[81] *See, e.g.*, Beaton v. LaFord, 261 N.W.2d 327 (Mich. Ct. App. 1977) (cohabiting couple who purported to take as tenants by the entireties took as joint tenants).

[82] *See, e.g.*, Peffley-Warner v. Bowen, 778 P.2d 1022 (Wash. 1989) (surviving cohabitant couple not entitled to widow's benefit under Social Security); Cassano v. Durham, 436 A.2d 118 (N.J. Super. Ct. Law Div. 1981) (plaintiff was not a "surviving spouse" within meaning of intestacy statute, and thus, she could not recover under Wrongful Death Act).

[83] *See, e.g.*, Estate of Hafner, 229 CAL. RPTR. 676 (Cal. App. 1986) (putative spouse received half the estate as quasi-marital property); Estate of Atherley, 119 Cal. Rptr. 41 (Cal. App. 1975) (putative spouse entitled to one-half of all property, acquired during "marriage," and to all property owned jointly and separately); Mjolsness v. Mjolsness, 363 N.W.2d 839 (Minn. 1985) (surviving former husband was not a putative spouse who could take against deceased former wife's estate). Putative marriages are recognized in some former civil law jurisdictions and under § 209 of the UMDA. *See* Comments to ALI PRINCIPLES § 6.01, at 9.

[84] What I mean by this is the following. If a couple marries, the stepparent may well have support obligations for the children of the spouse at least during the pendency of the relationship. *See, e.g.*, WASH. REV. CODE § 26.16.205:

> The expenses of the family and the education of the children, including stepchildren, are chargeable upon the property of both husband and wife, or either of them, and they may be sued jointly or separately. When a petition for dissolution of marriage or a petition for legal separation is filed, the court may, upon motion of the stepparent, terminate the obligation to support the stepchildren. The obligation to support stepchildren shall cease upon the entry of a decree of dissolution, decree of legal separation, or death.

N.D. CENT. CODE §14-09-09 provides:

> a. Liability of stepparent for support. A stepparent is not bound to maintain the spouse's dependent children, as defined in section 50-09-01, unless the child is received into the stepparent's family. If the stepparent receives them into the family, the stepparent is liable, to the extent of his or her ability, to support them during the marriage and so long thereafter as they remain in the stepparent's family.

But see Wood v. Woods, 184 CAL. RPTR. 471 (Cal. App. 1982) (not requiring that stepparent repay county for AFDC) (Whether this lasts beyond dissolution depends, under the Principles, upon whether the stepparent has become a de facto parent or parent by estoppel.). *Compare* Johnson v. Johnson, 617 N.W.2d 97 (N.D. 2000) (parent liable under doctrine of equitable adoption); with Bagwell v. Bagwell, 698 So.2d 746 (La. Ct. App. 1997) (no obligation after divorce). But no such obligation exists for the child of a cohabitant.

[85] The ALI PRINCIPLES, § 6.01 (1) provides that "[t]his Chapter governs the financial claims of domestic partners against one another at *the termination* of their relationship." (emphasis added). As Comment a to § 6.02 provides: "Nor are domestic relationships likely to provide a satisfactory alternative to marriage for those otherwise inclined to marry, for informal domestic relationships are not generally recognized by third parties, including governments, which often make marriage advantageous under various regulatory and benefit schemes."

[86] *See, e.g.*, Kelley v. Kelley, 9 P.3d 171 (Utah Ct. 2000). As the Comments to ALI PRINCIPLES § 6.01, at 2, reasons, in terms of legal incidents, there is no distinction between a lawful common-law marriage and a lawful ceremonial marriage. "Marriage creates a legal status that encompasses not only *inter se* rights and responsibilities of the spouses, but also rights and responsibilities of the spouses in relation to third parties and the state." Comment to §6.01 at 2 (emphasis in original). Comment (a) to the ALI PRINCIPLES, § 6.03 at 39 states that the District of Columbia and 11 states currently recognize common law marriage.

Now let's look at some famous cases to see how they'd be dealt with by the ALI. The most notable of all, of course, is *Marvin v. Marvin*.[87] The Marvins could not be married at common law because common law marriages were abolished in California.[88] Further, Lee Marvin was still married to Betty at the time he allegedly contracted with Michelle.[89] They did not qualify as putative spouses because neither had a good faith belief that they were married. Ultimately, on remand,[90] Michelle could prove neither an express contract nor unjust enrichment, so she was given no monetary award.[91] Would she recover under the ALI *Principles*? Apparently so. Their facts are Example 6 to paragraph (3)[92] which states that persons not related by blood or adoption are presumed to be domestic partners when they have "maintained a common household," as the Marvins clearly did, for a continuous period called the cohabitation period, which their six year cohabitation period would probably satisfy.[93] The presumption is rebuttable by evidence that the parties did not share or live together as a couple.[94] Most students of family law have read at least one of the *Marvin* opinions, in which they might well conclude, as the Court of Appeals did on remand, that Michelle had lived well while the relationship lasted, that Lee had done quite a bit to further her singing career, and that he had gone to some lengths not to marry her, so she was entitled to nothing more. The *Principles*, on the other hand, would apparently let her share the million or so dollars Lee earned during those six years under Chapter 4.

---

[87] 557 P.2d 106 (Cal. 1976).

[88] *Id.* at 117 n.11.

[89] *Id.* at 111. As with any other marriage, a person cannot enter into a common law marriage with another marriage still existing. For an attempted bigamous common law marriage, see Kasey v. Richardson, 331 F. Supp. 580 (W.D. Va. 1971) (holding that void marriage still enough to qualify a child as legal for Social Security dependent benefits).

[90] 176 Cal. Rptr. 555 (Cal. App. 1981).

[91] *Id.* at 557, 559.

[92] Illustration (6) of ALI PRINCIPLES § 6.03, at 25.

[93] For example, The ONTARIO FAMILY LAW REFORM ACT of 1986, §§ 29 and 30, requires "continuous cohabitation for not less than five years." The British Columbia support statute requires "a marriage-like relationship for a period of at least 2 years . . . ."

[94] Paragraph (7) of ALI PRINCIPLES § 6.03 lists a number of factors for rebutting the presumption. Lee Marvin could point to absence of the following factors to support lack of "life together as a couple": (a) statements made to third parties about their relationship, (b) the extent to which they commingled finances, (e) the extent to which the relationship wrought change in the life of either, (f) the extent to which acknowledged responsibility to one another by making beneficiaries, (j) participation in a commitment ceremony, (l) no children.

In contrast, the ALI result of the fact pattern in *Hewitt v. Hewitt*[95] probably would be more appealing than the one actually reached by the Illinois court,[96] but demonstrates "undershooting," since Ms. Hewitt would have received more complete relief under a tort claim for fraud and deceit rather than a contract action.[97] Of course, what she might claim would not be so much the result of hurt

---

[95] 394 N.E.2d 1204 (Ill. 1979). Hewitt is apparently Illustration 3 to § 6.03, at 23-24, which notes that the couple meets the requirements of Paragraph 2 that "they have maintained a common household . . . with their common child . . . for a continuous period that equals or exceeds a duration, called the *cohabitation parenting period*" (emphasis in original). They had lived together for 15 years, satisfying any reasonable time period. Victoria allegedly thought they were married once she became pregnant and Robert convinced her that they were already married. She supported him while he pursued an advanced degree and established a successful practice as a podiatrist. The opinion notes that outwardly they maintained a very conventional lifestyle. For her not to recover "an equal share of the profits and properties accumulated by the parties" seems unjust under a fraud and deceit theory as well. Presumably, if she had known that they were not married, Victoria would have insisted on a ceremonial marriage and thus would not have had legal difficulties. If she had insisted on the ceremony and Robert had been deceptive, getting an unlicensed person to perform the ceremony, she would have been able to recover under the putative spouse doctrine.

[96] The opinion found that she was not common law married (because common law marriages have been abolished in Illinois since 1905), that she did not qualify as a putative spouse because she had not gone through a ceremony, not for a contract relief because of the illegality of the parties' relationship. *See also* Thomas v. LaRosa, 400 S.E.2d 809, 814 (W. Va. 1990). The opinion has not been extended in Illinois. Crawford v. City of Chicago, 710 N.E.2d 91, 100 (Ill. App. Ct. 1999), noted that as indicated by the very language plaintiffs cite from *Hewitt* and *Jarrett*, whether non-married individuals have the same rights as married individuals is an issue for the Legislature to determine. The General Assembly has never legislated on the question whether same-sex, cohabiting individuals may purchase the same health insurance as married individuals. There is no public policy prohibiting the exercise of home-rule authority in this area. Fornication that is "open and notorious" continues to be a misdemeanor under 720 ILL. COMP. STAT. 5/11-8, though no-fault divorce was enacted in Illinois in 1983, S.189, P.A. 83-954, effective July 1, 1984.

[97] In Alexander v. Kuykendall, 63 S.E.2d 746 (Va. 1951), the woman worked as supervisor in the Norfolk Navy Yard. The man convinced her to marry him and move to northern Virginia. She quit her job, went through a ceremony, moved to northern Virginia, and lived with him as his wife, bearing his child. When she discovered that the entire time he had had an existing marriage, she sought recovery in contract for the value of her services, and in tort for humiliation and embarrassment. She could recover under tort only, because her services were performed as his wife, not for hire. Cooper v. Spencer, 238 S.E.2d 805 (Va. 1977), provides an example of a couple who lived together for many years thinking they were validly married when in fact neither of their divorces from prior marriages was finalized before their ceremony. The "wife" could not recover a share of the farm assets titled in his name as a partner, because there were no written partnership documents. The wife could not recover under implied contract, because she believed herself married and therefore acted out of love and affection, rather than the hope of pecuniary gain. In Lampus v. Lampus, 660 A.2d 1308 (Pa. 1995), the man, knowing that his prior divorce had been declared invalid, nevertheless, entered into another marriage. Upon his death, the woman discovered that her marriage had been bigamous and asserted claims for breach of promise to marry, and for deceit, negligent misrepresentation, concealment, and negligence. The court upheld the lower court's dismissal of the breach of promise to marry claim, but allowed the woman to maintain the remaining counts. In Jackson v. Brown, 904 P.2d 685 (Utah 1995), the man was also already married when he promised to marry the woman. He did not tell her of his married status. Nevertheless, he participated with her in planning the wedding and obtaining a marriage license, but on the morning of the wedding told her he would not marry her, but he still did not tell her that he was already married. She sued him for breach of promise to marry and for intentional infliction of emotional distress. In Utah, there was no statute prohibiting breach of promise suits. The court then, in essence, abolished the cause of action but preserved what could be termed a right to maintain palimony actions—"losses . . . may be recoverable under a theory of reasonable reliance or breach of contract." *Id.* at 687. The court permitted the maintenance of an actionfor intentional infliction of emotional distress because the man knew he was already married, and thus could not marry the woman when he proposed to her, obtained the marriage license, and planned the wedding. These actions, the Utah court held, might be

feelings or embarrassment as the lack of equity in allowing Robert to profit from her investments in his career, and from parenting their children.[98] So the domestic partnership provisions would at least give Victoria Hewitt partial relief, though perhaps less than what would be granted to Michelle Marvin.[99]

In *Miller v. Ratner*,[100] a woman moved in with one of the co-owners of the "Hair Cuttery" chain with the expectation, shared by her friends, that they would shortly be married.[101] He literally threw her out of the residence some time later after she was diagnosed with breast cancer and had a mastectomy performed. She sued in tort as well as for the value of her services performed during the three years they lived together. Lonnie Miller thought the couple was to marry, and therefore would continue to fall under the bans of the heartbalm legislation[102] as

---

sufficiently "'outrageous and intolerable in that they offend . . . generally accepted standards of decency and morality.'" *Id.* at 688 (quoting Samms v. Eccles, 358 P.2d 344, 347 (Utah 1961)).

[98] Another possibility for her would have been possible in Texas, where at least one case allows recovery as a putative spouse even after an attempted common law marriage. Hupp v. Hupp, 235 S.W.2d 753 (Tex. Civ. App. 1950). Arguably the two situations are distinguishable, though, since Texas, unlike Illinois, does recognize common law marriage. The problem the Hewitts had is that they were able to marry, but did not.

[99] The difference in the recoveries in the two cases comes from the difference in the types of investment the two women made. Lee earned a tremendous sum of money during the relationship. Robert Hewitt's earnings, while considerable, are more valuable only as they accumulate over his career. Michelle's claim as a household-service provider comes from the "backup" support she provided to the career Lee already had as an actor at the time they met. It is therefore based upon his future earnings, and the assets they purchased, both clearly recoverable under Chapter 6. Victoria's claim, as she supported his acquisition of a degree (clearly held in Robert's name) and nurtured their children, is less straightforward. While Victoria might claim some share of his future earnings as "compensatory payments" under § 6.06, it is difficult to see, since she worked throughout the marriage "with her own special skills" and deposited payroll checks in a common fund, that she has suffered the type of "loss of living standard," needed under § 5.03, with Robert accumulating "large amounts of property," some of which was owned separately. She would also need to prove under § 5.16 that the relationship dissolved before she realized a fair return from her investment in Robert's earning capacity. She may be able to claim that their period together justified an award under §5.05(1) (significant difference in wealth or earning capacity). But see the cautionary comments to this section on the value of homemaker services (contribution as opposed to loss), ALI PRINCIPLES at 303–04. In other words, while she might well have a property distribution claim under Chapter 4 to a portion of the "large amounts of property" accumulated during the relationship, she may well lose out on future wealth that in the long run is more significant. A damage award under a tort claim might well give her more money.

Had the relationship stayed together until Robert's death, Victoria would clearly do better under the tort treatment since Chapter 6 only compensates at dissolution. While the recovery would be in tort, the damages would be similar to what she'd receive as a putative spouse.

[100] 688 A.2d 976 (Md. Ct. Spec. App. 1997).

[101] The court, citing appellant's brief, termed this a "permanent commitment that would be followed by marriage." *Id.* at 987.

[102] MD. CODE ANN. [Fam. Law] § 3-102.

far as any tort was concerned.[103] The couple also stayed together for a period too brief to qualify under most state "cohabitation periods."

Nor would the result change in *Michael H. v. Gerald D.*,[104] since parenting is not governed by Chapter 6 of the Principles, but instead by Chapter 2.[105] Though Michael and Carole, the married woman in question, did live together and together had a child, and although Chapter 6 would not rule out "domestic partnerships" to those with still-valid marriages to others, presumably the period of time during which Michael and Carole lived together (a total of eleven months) would be too short. But Michael's knowledge that Carole was married to another would not have barred the acquisition of rights to a share in her accumulated property[106] if they had shared a "primary residence."[107]

So, results would change in some cases (and would give Michelle Marvin more than many of us would think she deserved), but many other people with just claims would go under- or uncompensated. The ALI thus misses the target most of us would envision. The broader policy argument is that people who can marry ought to be encouraged to do so, for the increase in what those relationships can accomplish, for the sake of the stability of the relationships, and especially for the sake of their children.

---

[103] The *Miller* court distinguished the case from traditional "palimony" actions by noting:

> The palimony cases that we have examined have one thing in common. They exist in a factual précis that is completely free of any taint of a breach of promise to marry. So long as persons initiate and maintain their relationships based upon promises of marriage, and its anticipation, rights arising out of those promises or agreements cannot escape the bar by being recast as agreements between nonmarital partners. That is not to say that if the agreement to marry is terminated and the relationship either continues or recommences, as in *Kozlowski*, under a new agreement, in which no promises to marry are made and which does not anticipate a marriage, that a contractual action might not be sustainable. Moreover, while we do not so decide, it is not difficult to surmise that breach of contract actions between nonmarital partners completely free of promises in anticipation of marriage, might also be viable.

Id. at 992.

[104] 491 U.S. 110 (1989) (upholding, as a constitutional matter, California's irrebuttable presumption of legitimacy of children born during a couple's marriage, unless objected to by one of the spouses).

[105] ALI PRINCIPLES § 6.01(4) provides that "[c]laims for custodial and decisionmaking responsibilities, and for child support, are governed by Chapters 2 and 3, and not by this Chapter."

[106] Comment (d) to ALI PRINCIPLES § 6.01, at 8, provides that "[k]nowledge that one or both of the parties are married to another person is not conceptually inconsistent with assertion of claims under this Chapter."

[107] In fact, Michael lived with Carole and Victoria when "if he happened to be in Los Angeles, he stayed with her and the child," *Michael H.*, 491 U.S. at 124, though they "shared the same household," *id.* at 143–44, and Michael "contributed to Victoria's support."

Table 1. Relative risk of partnership dissolution according to type of first partnership for women aged 20–39 years. Model 2 with controls for age at first partnership

Country	Model 1	Model 2
Sweden		
Married directly	1	1
Cohabited-married	0.88	0.88
Cohabited	7.73***	7.81 ***
Norway		
Married directly	1	1
Cohabited-married	0.70 **	0.71 **
Cohabited	8.23***	8.69***
Finland		
Married directly	1	1
Cohabited-married	0.97	0.89
Cohabited	4.91***	4.35***
France		
Married directly	1	1
Cohabited-married	1.2	1.15
Cohabited	2.27***	2.01 **
Austria		
Married directly	1	1
Cohabited-married	0.89	0.87
Cohabited	5.12***	4.58***
Switzerland		

Married directly	1	1
Cohabited-married	1.01	1.03
Cohabited	12.3***	12.9***
West Germany		
Married directly	1	1
Cohabited-married	1.21	1.15
Cohabited	4.14***	3.83***
East Germany		
Married directly	1	1
Cohabited-married	1.08	1.07
Cohabited	1.63***	1.55***
Great Britain		
Married directly	1	1
Cohabited-married	1.08	1.07
Cohabited	10.5***	10.2***
Italy		
Married directly	1	1
Cohabited-married	1.52	1.48
Cohabited	19.1 **	16.8***
Spain		
Married directly	1	1
Cohabited-married	2.59***	2.52***
Cohabited	18.71***	16.5***

From Kathleen Kiernan, *Cohabitation in Western Europe*, 96 POPULATION TRENDS 25, 30 & Table 7 (Summer 1999). Data based on Eurobarometer Surveys from 1996, typically several thousand respondents per country.

Table 2. Life-table estimates of percentage of unions surviving 3 and 5 years after the birth of first child amongst women aged 20-45 years according to type of first partnership.

Country	% surviving 36 months	% surviving 60 months	Number in the risk set
Norway*			
Married	97	94	1677
Cohabitation	87	82	456
cohabited/married	98	95	131
cohabited only	79	71	325
Sweden*			
Married	96	93	817
Cohabitation	90	84	1424
cohabited/married	97	94	493
cohabited only	84	75	931
Austria			
Married	97	94	2161
Cohabitation	92	86	670
cohabited/married	98	96	246
cohabited only	86	71	424
Switzerland			
Married	97	95	2191
Cohabitation	82	73	166
cohabited/married	95	86	65

cohabited only	64	53	101
West Germany**			
Married	95	91	873
Cohabitation	92	85	161
cohabited/married	97	91	45
cohabited only	89	80	116
France			
Married	92	86	1348
Cohabitation	82	73	594
cohabited/married	86	77	103
cohabited only	81	71	491
Great Britain			
Married	96	92	1242
Cohabitation	71	57	149
cohabited/married	90	75	43
cohabited only	61	48	106
Italy			
Married	99	98	2677
Cohabitation	95	91	90
cohabited/married	-	-	31
cohabited only	93	82	59
Spain			
Married	99	98	1540
Cohabitation	79	67	74
cohabited/married	-	-	16

cohabited only	71	51	58

From Kathleen Kiernan, *Childbearing Outside Marriage in Western Europe*, 98 POPULATION TRENDS, 11, 19 & Table 11 (Winter 1999). Data based on UN ECE European Family and Fertility Surveys and British Household Panel Survey, taken 1992–96.

Table 3. Combined Effects of Interactions of Fairness and Hours of Work on Risk of Marital Disruption.

	Husband's Sense of Fairness About Paid Work								
	Very Unfair to Me			Fair to Both			Very Unfair to Her		
	Husband-Fairness About Household Work			**Husband-Fairness About Household Work**			**Husband-Fairness About Household Work**		
Wife's Sense of Fairness About Paid Work	Very Unfair to Me	Fair to Both	Very Unfair to Her	Very Unfair to Me	Fair to Both	Very Unfair to Her	Very Unfair to Me	Fair to Both	Very Unfair to Her
Very Unfair to Me									
Wife Fairness Household Work									
Very Unfair to Me	4.43	3.10	2.17	2.06	1.44	1.01	.96	.67	.47
Fair to Both	2.55	1.79	1.25	1.19	.83	.58	.55	.22	.16
Very Unfair to Him	1.47	1.03	.72	.68	.48	.34	.32	.22	.16
Fair to Both									
Wife Fairness Household Work									
Very Unfair to Me	8.48	5.93	4.15	3.94	2.76	1.93	1.83	1.28	.90
Fair to Both	8.48	3.42	2.39	2.27	1.59	1.11	1.06	.74	.52
Very Unfair to Him	2.82	1.97	1.38	1.31	.92	.64	.61	.82	.30
Very Unfair to Him									
Wife Fairness Household Work									
Very Unfair to Me	16.22	11.35	7.95	7.54	5.28	3.69	3.51	2.45	1.72

Fair to Both	9.35	6.55	4.58	4.35	3.04	2.13	2.02	1.42	.99
Very Unfair to Him	5.39	3.77	2.64	2.51	1.75	1.23	1.17	.82	.59

From Nock and Brinig, supra note 47.